United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

S.A.M. DATE: April 22, 2016

TO: Charles L. Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Seven Hills, Inc.
Cases 05-CA-159426, 05-CA-157153,
05-CA-149015, 05-CA-135126

506-6050-2500
506-6080-0800
512-5036-6720-5600
524-8351-4300

These cases were submitted for advice as to whether a series of eight full-day strikes over the course of almost two years, during which employees joined in political protests with other federal contractor employees over wages, constituted protected concerted activity rather than unprotected "intermittent" strikes. Resolution of this legal issue is determinative of whether the Employer violated Section 8(a)(1) by engaging in various retaliatory acts against strikers. We conclude that the strikes were protected, and consequently, the Employer's actions unlawfully coerced employees in the exercise of their Section 7 rights.

FACTS

Seven Hills, Inc. ("Employer") operates ten food concession outlets at the Pentagon under contract with the Navy Exchange Service Command ("Navy Exchange"), a government entity. It employs about 70 non-supervisory employees at these outlets. In addition to the Pentagon outlets, the Employer operates more than a dozen fast-food restaurants in Virginia, Maryland, and Pennsylvania.

Good Jobs Nation is a campaign by the Change to Win Labor Federation to improve the wages and benefits of federal contractor employees by, among other things, securing an executive order requiring contractors to pay their employees at least $15.00 per hour. The campaign is currently targeting about twenty federal contractors, including the Employer. Change to Win is not seeking to represent employees as a labor organization, but (b) (4), (b) (6), (b) (7)(C) employed by the Employer have signed cards in support of the campaign. The campaign coordinates political protests, which are attended by hundreds of striking employees of federal contractors, including the Employer's employees. The protests are planned weeks in advance and are scheduled so as to attract media attention, such as by arranging for the appearance of high-profile politicians. Strike notices are circulated to employees

about a week or two in advance of the scheduled protests to solicit employee participation.

The Employer's employees at the Pentagon engaged in eight one-day strikes in 2014 and 2015, during which most strikers attended protests organized by Good Jobs Nation. The strikes occurred about every two to three months, with the longest break being six months and the shortest about three weeks. Specifically, employees struck on January 22, 2014 (first strike), July 29, 2014 (second strike), November 13, 2014 (third strike), December 4, 2014 (fourth strike), April 22, 2015 (fifth strike), July 22, 2015 (sixth strike), September 22, 2015 (seventh strike), and November 10, 2015 (eighth strike). Participation in the strikes gradually increased over time, with a peak of between 26 to 36 employees during the fifth and sixth strikes.[1]

Typically, Good Jobs Nation provided notice of a strike to the Employer the evening prior to the strike.[2] The notices contained the strikers' names and signatures and made an unconditional offer to return to work the following day. Each notice for the first through fourth strikes stated that employees were going on strike "to demand better wages and benefits, and to insist that our legal right to join together to improve our employment conditions is respected." Thereafter, the notices cited varying unfair labor practices (which were allegedly committed weeks or months before the strikes) as the basis for each strike, namely: to demand respect for the right to wear insignia at work (fifth strike notice), to demand employees' old schedules back and the reinstatement of two employees who were discharged after the fifth strike (sixth strike notice), to demand the reinstatement of two employees who were terminated after the sixth strike (seventh strike notice), and to demand an end to threats against employees for taking concerted action to improve pay and working conditions (eighth strike notice). All of the notices (including those for the fifth through eighth strikes) stated that employees "are sick and tired of working hard for poverty-level wages that

[1] The number of employees who actually struck, that is, did not show up for a scheduled shift, was much lower than the number of employees who signed the strike notices. The number of employees who actually struck was: 0 to 2 for the first strike, 3 to 9 for the second strike, 10 to 13 for the third strike, 14 to 22 for the fourth strike, 26 to 36 for the fifth strike, 27 for the sixth strike, 15 to 20 for the seventh strike, and 16 for the eighth strike. Uncertainty as to the number of employees who actually struck is primarily due to the Employer's failure to produce comprehensive scheduling and timekeeping records, but also the fact that some purported strikers did not sign in at the Good Jobs Nation protest.

[2] For the first strike, Good Jobs Nation did not send the strike notice to the Employer until the morning of the strike. While there is some evidence that some supervisors or managers were aware of the strikes before the Employer received the strike notices, it was typically no more than one day in advance.

do not allow us to afford decent housing, provide for our families and take care of our health and other basic needs."

The Employer's Assertions

The Employer asserts that the strikes negatively impacted its business in three respects: by causing outlets to close for the day, by reducing sales at other outlets, and by harming its business relationships with the government and franchisors. While none of the Employer's ten Pentagon outlets closed as a result of the first strike, each subsequent strike caused some closures. Specifically, one outlet closed during the second and eighth strikes, two outlets closed during the third, fourth, sixth, and seventh strikes, and three outlets closed during the fifth strike.[3] One particular outlet, the Taco Bell/KFC restaurant, closed on at least four occasions. The other outlets that closed did so only once or twice.

The Employer asserts that it was forced to close outlets because it was infeasible to obtain replacement labor, but its claims in this regard are overstated or unsubstantiated. The Employer claims that it is virtually impossible to temporarily assign non-Pentagon employees to the Pentagon or hire new employees to maintain operations because it takes at least three to five business days to obtain a security badge, and the badges are inactivated if they are not used at least once every 30- to 45-day period. The Employer admittedly borrowed a few employees from non-Pentagon locations to fill in during the eighth strike, when it received warning about the strike from the Navy Exchange a week before it occurred. The Employer claims that borrowing outside employees is not a viable solution to fully maintain operations because such replacements need to be escorted by someone with a security badge all day.[4] However, according to the Navy Exchange, there is a process for on-call employees to obtain a security badge that is active for a full year. The Employer also asserts that it cannot use off-duty Pentagon employees to cover for strikers because most of its staff is full-time, and its part-time employees often hold other jobs and are not readily available. To the contrary, the evidence suggests that at least half of its

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[3] The Employer's claim that an additional outlet closed during the second, third, and fourth strikes was unsubstantiated. It is unclear whether an additional outlet closed during the eighth strike. Only one employee was scheduled to work at the Freshens outlet and that employee struck, but the Employer did not provide relevant timekeeping records or sales data to demonstrate that no one worked.

[4] According to the Navy Exchange, managers are permitted to escort up to three individuals per day onsite, but those escorted individuals are prohibited from working until they receive their own security badge. It appears that the Employer did not abide by this rule when it permitted non-Pentagon employees to work during the eighth strike.

workforce works less than 30 hours per week (based on the limited work schedules produced during the investigation). The Employer has not substantiated its claim that part-time employees are unavailable for work outside their scheduled hours. Although the Employer claims that few employees are crossed-trained to work at other Pentagon outlets, it admits that it can and has juggled employees around on strike days. Finally, the Employer asserts that Pentagon security would not allow the use of temp workers from an agency, but it has not substantiated this claim or explained why temps would be ineligible to receive a yearly badge for on-call employees.[5]

With respect to the Employer's claim that open outlets did less business on strike days, the evidence is equivocal. Some outlets experienced a drop in customers on strike days, while others did not. In some instances, outlets served even more customers on strike days compared to the days before and after the strike.

With respect to the claim that the strikes have interfered with the Employer's business relationships, the Employer asserts that the strikes have caused it to breach its government contract and its franchise agreements. The Employer claims that the Navy Exchange opens compliance investigations and levies fines when outlets close, and that these contract breaches adversely affect its prospects for securing future government contracts. By letter dated October 2, 2015, the Navy Exchange chastised the employer for breaching the contract by closing some outlets during the sixth and seventh strikes, levied a $191.91 fine for the latter closures, and demanded that the Employer submit a plan of action to prevent future closures. Furthermore, the Employer claims that the closures have caused it to breach its franchise agreements by failing to fulfill brand standards due to inadequate staffing, but it has not substantiated this claim. The Employer produced a notice of noncompliance from Starbucks for closing one of the Pentagon outlets the day of the third strike, but it does not appear that the strike caused the outlet closure since only 2 out of 20 employees assigned to Starbucks signed the strike notice.[6]

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[5] According to one of the Employer's Pentagon contracts, any subcontractors or outside associates must be agreed to by the Navy Exchange. It is unclear whether this provision would, in fact, prohibit the Employer from utilizing labor from a temp agency.

[6] Assuming the strikes are protected, the Region plans to issue complaint alleging that the Employer unlawfully disciplined one employee for missing work to attend the second strike, disciplined and discharged four other employees for pretextual reasons shortly after the fifth and sixth strikes, reduced employees' hours of work because of the fifth strike, and interrogated and threatened employees in connection with the second, fifth, and sixth strikes. The Region has also concluded that the Employer unlawfully coerced employees with respect to their wearing of Good Jobs Nation

ACTION

We conclude that the employees were engaged in protected concerted activity and not unprotected, intermittent strikes. Accordingly, the Employer violated Section 8(a)(1) by threatening, interrogating, disciplining, discharging, and reducing the hours of work of employees as a result of their strike activity.

The right to strike is statutorily protected under Sections 7 and 13 of the Act.[7] "Without question employees have a protected right to withhold services from an employer," whether to protest unfair labor practices or for other reasons, such as to enhance their bargaining position or to act together to better their working conditions.[8] The Board has been particularly likely to find work stoppages protected when the employees were not represented by a union.[9] That is essentially because in those instances, the employees lacked a lawfully implemented grievance procedure or a recognized bargaining representative to assist them in negotiating

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campaign stickers and their discussing grievances with customers, and promulgated new uniform rules to discourage protected concerted activity.

[7] *NLRB v. Preterm, Inc.*, 784 F.2d 426, 429 (1st Cir. 1986) (pursuant to Section 7, "employees are granted the right to peacefully strike, picket and engage in other concerted activities"); *NLRB v. Drivers, Chauffeurs, Helpers, Local 639 (Curtis Bros.)*, 362 U.S. 274, 281 (1960) (Section 13 "provides, in substance, that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right . . . unless 'specifically provided for' in the Act itself").

[8] *Embossing Printers*, 268 NLRB 710, 722 (1984), *enforced mem.*, 742 F.2d 1546 (6th Cir. 1984) (table decision); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1962).

[9] *See Washington Aluminum*, 370 U.S. at 14-15 (employees' work stoppage protected despite failure to make specific demand upon employer to remedy objectionable condition where they were part of a small group of unorganized employees; having no bargaining representative and no established procedure for negotiating with the company, they took the most direct course to let the company know that they wanted a warmer place in which to work); *Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (employees' joint cessation of work to protest perceived safety violations and inadequate health insurance coverage protected, especially where there was no bargaining representative, notwithstanding the reasonableness of their perception, any lack of notification to the employer of their intent to cease work, or the existence of alternative methods of solving the problems).

improved working conditions and resolving grievances.[10] Whether a concerted work stoppage has lost the Act's protection is an affirmative defense; thus, the employer bears the burden of showing that the stoppage is unprotected.[11]

A work stoppage that seeks a statutorily protected goal will be deemed unprotected because of its partial or intermittent character only in certain limited circumstances. There are essentially three bases for finding that a partial or intermittent strike is unprotected. First, the Board has held such work stoppages unprotected where they are part of a planned strategy to "harass the company into a state of confusion," such as through intermittent "'hit and run' strikes."[12] Second,

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[10] *See, e.g.*, *Advance Industries Division*, 220 NLRB 431, 431-32 (1975) (employees engaged in protected conduct by staying on the premises past unilaterally established shift where they did not have the benefit of a bargained-for grievance procedure), *enforcement denied in relevant part*, 540 F.2d 878 (7th Cir. 1976); *Polytech, Inc.*, 195 NLRB 695, 696 (1972) (noting that employees were unrepresented and lacked "structured procedures to protest . . . working conditions" in finding single concerted refusal to work overtime protected). *Cf. Swope Ridge Geriatric Center*, 350 NLRB 64, 64 n.3, 68 (2007) (employees were represented by a union, whose intent was to engage in a series of recurring intermittent work stoppages as part of its underlying bargaining strategy until a contract was reached).

[11] *See, e.g.*, *Silver State Disposal Service*, 326 NLRB 84, 85 (1998) (respondent bears burden of showing that work stoppage is unprotected) (citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 277 (1956) (whether a work stoppage is unprotected because it violates a no-strike clause is an affirmative defense), and *Heavy Lift Services, Inc.*, 234 NLRB 1078, 1079 (1978) ("the initial burden of proceeding with proof of an affirmative defense rests with Respondent"), *enforced*, 607 F.2d 1121 (5th Cir. 1979)).

[12] *See Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1548-50 (1954) (union-orchestrated waves of work stoppages at different locations over nine days unprotected where they were admittedly calculated to "harass the company into a state of confusion" by repeatedly striking only as long as it took for the employer to find replacements; the "inherent character of the [hit and run] method used [set] this strike apart from the concept of protected union activity envisaged by the Act") (citing *Auto Workers v. Wis. Employment Relations Bd. (Briggs-Stratton)*, 336 U.S. 245, 249-50, 264 (1949) ("recurrent or intermittent" work stoppages—26 mid-day stoppages over four and a half months—pursuant to a union plan to hold surprise meetings during work hours to exert pressure on the employer while avoiding the hardships of a strike were unprotected under federal law; union did not provide notice as to when or whether the employees would return to work and did not inform the employer of any concessions it could make to avoid the stoppages), *overruled on other grounds by Lodge 76, Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 151-52 (1976)). *Cf. United States Service Industries*, 315 NLRB 285, 285-86 (1994) (three

the Board has held striking employees unprotected when they engage in quasi-strikes that are "intentionally planned and coordinated so as to effectively reap the benefit of a continuous strike action without assuming the economic risks associated with a continuous forthright strike, i.e., loss of wages and possible replacement."[13] This type of no-risk, partial strike is unprotected because employees are unfairly exerting economic pressure on their employer without assuming the status of strikers.[14] This principle has been applied where employees pick and choose which tasks to perform[15] or which portion of the work day they will work, including circumstances in which employees selectively work on an intermittent basis.[16] Finally, employees are not entitled to dictate their own terms

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strikes involving one set of worksites and then a different set protected where striking employees were not "engaged in a campaign to harass the [c]ompany into a state of confusion"), *enforced mem. per curiam*, 72 F.3d 920 (D.C. Cir. 1995) (table decision); *WestPac Electric*, 321 NLRB 1322, 1360 (1996) (three strikes within a two-week period protected where they were not part of "hit and run" scheme, and were for separate employer acts).

[13] *WestPac Electric*, 321 NLRB at 1360 (finding no such quasi-strike condition). *See also New Fairview Hall Convalescent Home*, 206 NLRB 688, 747 (1973) ("the Board and the courts have deemed it an 'indefensible' tactic for employees to refuse to work on the terms prescribed by their employer, and yet to remain on their jobs and thus deny the employer the opportunity to replace them with workers who will accept these terms"), *enforced sub nom. Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975).

[14] *First National Bank of Omaha*, 171 NLRB 1145, 1151 (1968) ("[W]hat makes any work stoppage unprotected . . . [is] the refusal or failure of the employees to assume the status of strikers, with its consequent loss of pay and risk of being replaced. Employees who choose to withhold their services because of a dispute over [terms and conditions] may properly be required to do so by striking unequivocally. They may not simultaneously walk off their jobs but retain the benefits of working."), *enforced*, 413 F.2d 921 (8th Cir. 1969).

[15] *See, e.g.*, *Audubon Health Care Center*, 268 NLRB 135, 136-37 (1983) (unprotected partial strike where nurses refused to work in the open section "while accepting pay" for the work they remained willing to perform; "employees must withhold all their services from their employer" during a strike, and may not "pick and choose the work they will do or when they will do it"). *See also Yale University*, 330 NLRB 246, 247-48 (1999) (teaching fellows engaged in unprotected partial strike by refusing to turn in students' grades while continuing to perform other duties).

[16] *Compare Polytech*, 195 NLRB at 696 (noting that "when employees engage in repeated work stoppages *limited to a portion of the working day*, they are plainly

and conditions of employment.[17] Accordingly, employees may not engage in part- or full-day work stoppages in such a way as to effectively set their own work schedules.[18]

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unwilling to assume the status of strikers") (emphasis added), *and Valley City Furniture Co.*, 110 NLRB 1589, 1594-95 (1954) (refusal to perform overtime unprotected because union "sought to bring about a condition that would be neither strike nor work"), *with WestPac Electric*, 321 NLRB at 1360 (three strikes over two-week period consisting of one part-day strike and two multi-day strikes were not designed to reap the benefit of a continuous strike without the economic risks). *See also Embossing Printers*, 268 NLRB at 711, 723 (finding employees' clocking out of work on three different days to attend union meetings regarding contract negotiations constituted a pattern of intermittent partial strikes inconsistent with a genuine strike); *New Fairview Hall Convalescent Home*, 206 NLRB at 701-02, 708, 746-747 (applying this standard in finding three mid-day walkouts about three weeks apart, lasting thirty minutes to three and a half hours each, unprotected "recurrent, intermittent and partial work stoppages").

[17] *See, e.g.*, *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1807-11 & n.3 (1954) (union campaign of weekend strikes over four consecutive weeks amounted to employees "impos[ing] upon the employer their own chosen conditions of employment" by converting 7-day workweek to 5-day workweek; "[w]e are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him"); *Valley City Furniture*, 110 NLRB at 1594-95 (union tactic of regularly refusing to work overtime amounted to attempt to "dictate the terms and conditions of employment"; "[w]ere we to countenance such a strike, we would be allowing a union to do what we would not allow an employer to do, that is to unilaterally determine conditions of employment"); *John S. Swift Co.*, 124 NLRB 394, 396-97 (1959) (refusal to work overtime constituted "attempt to work on terms prescribed solely by [employees]"), *enforced in part*, 277 F.2d 641 (7th Cir. 1960); *Audubon Health Care Center*, 268 NLRB at 136-37 (refusal to perform certain work "constitutes an attempt by the employees to set their own terms and conditions of employment"); *Embossing Printers*, 268 NLRB at 723 (noting that employees "did not have a right under the Act to come and go as they pleased" in finding three walkouts to attend union meetings during working hours unprotected intermittent partial strikes).

[18] *See Honolulu Rapid Transit*, 110 NLRB at 1807-11 & n.3 (all-day weekend strikes); *Swope Ridge Geriatric Center*, 350 NLRB at 68 (applying *Honolulu Rapid Transit* in finding two 24-hour weekend strikes unprotected).

The Board has made clear that the mere fact that employees engage in multiple work stoppages does not render their activities unprotected.[19] There is no "magic number" before they are considered to be of a "recurring nature."[20] Moreover, employees "are not required to institute the strike at any particular time of the day or to maintain it for any particular period of time to be entitled to the protection of the Act."[21] Further, the fact that work stoppages are designed to disrupt an employer's operation does not render them unprotected because disruption is an inherent aspect of a strike.[22]

The strikes here were not designed to harass the Employer into a state of confusion

The Board has found multiple work stoppages to be "beyond the pale of proper strike activities" where they involve "hit and run" tactics deliberately designed to "harass the company into a state of confusion" through "calculated unpredictability."[23] In *Pacific Telephone,* the Board found the union to be engaged in unlawful intermittent work stoppages where it coordinated waves of strikes by employees at different offices over a nine-day period, during which the employer was compelled to "'get its defenses up'—or gather substitute workers wherever a stoppage

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[19] *United States Service Industries*, 315 NLRB at 285 (citing *Chelsea Homes*, 298 NLRB 813, 831 (1990), *enforced mem.*, 962 F.2d 2 (2d Cir. 1992) (table decision)); *Robertson Industries*, 216 NLRB 361, 361-62 (1975) (two work stoppages three months apart totaling two days' absence from work as part of employees' continuing effort to resolve work-related problems is not the type of pattern of recurring stoppages warranting the deprivation of Section 7 protection; to hold otherwise would "disallow employees to engage in more than one instance of concerted protected activity during an indefinite period of time regardless of the variety and number of conditions or occurrences protested and the identity of the individuals involved"), *enforced*, 560 F.2d 396 (9th Cir. 1976); *WestPac Electric*, 321 NLRB at 1359-60 (three strikes within a two-week period protected).

[20] *Robertson Industries*, 216 NLRB at 362.

[21] *First Nat'l Bank of Omaha*, 413 F.2d at 925.

[22] *See Allied Mechanical Services*, 341 NLRB 1084, 1102 (2004) ("a requirement that a strike not be disruptive of an employer's operations, or harassing to it, is a requirement that the strike not be conducted"), *enforced*, 668 F.3d 758 (D.C. Cir. 2012); *Swope Ridge Geriatric Center*, 350 NLRB at 67 ("It is axiomatic that the very purpose of a strike is to cause disruption, both operationally and economically, to an employer's business operations . . . .").

[23] *Pacific Telephone*, 107 NLRB at 1548-49.

was unexpectedly pulled—'only to have the picket line gone' when the emergency crews reached the picketed place."[24] As the Board noted in that case, the union acknowledged that its surprise "hit and run" tactics were deliberately calculated to "harass the company into a state of confusion," tax management's ability to organize its offices, and shut down the employer's nationwide operations.[25] The union also acknowledged that this tactic was advantageous because most workers would remain on the job and collect pay while a subset of key employees would effectively harass the company into a state of confusion.[26] In these circumstances, the Board found the strikes unprotected because the union's tactics were inconsistent with the concept of protected activity envisioned by the Act.[27] The Board also explained that the employer had a right to know whether the operation was going to continue for the day or not, and the strikers were unwilling to give that assurance.[28]

Applying the above principles here, the strikes, while planned, were not unlawfully designed to "harass the employer into a state of confusion" or to cripple its operations using a small subset of employees.[29] Here, there was no scheme to use "calculated unpredictability" to wreak havoc on the Employer's operations. For all but the first strike, employees gave notice of the strike the night before, informing the Employer of which employees would be out on strike and when they planned to return to work. With this information, the Employer could organize its operations for the day and arrange for replacement labor as best as possible within the constraints of the Pentagon's security protocols. Although the Employer's efforts to secure replacements may have been marginally more successful with earlier notice,[30]

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[24] *Id.*

[25] *Id.* at 1548 n.3, 1549.

[26] *Id.* at 1548 n.3.

[27] *Id.* at 1549-50.

[28] *Id.* at 1551. The only other case finding a strike to be unprotected because it was calculated to create a state of confusion is *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), *enforced*, 156 F.3d 1268 (D.C. Cir. 1998), however that case is not precedential since exceptions were not filed to the dismissal of allegations related to striker discipline. *See id.* at 499 n.1.

[29] *United States Service Industries*, 315 NLRB at 285 (mere fact that several employees struck more than once does not render their conduct intermittent striking where there was no evidence of strategy to "harass the company into a state of confusion" through use of hit and run strikes).

[30] Notably, the Employer still complained of difficulty replacing strikers even when given one week's notice in advance of the eighth strike.

advance notice is not generally a prerequisite to a lawful strike where no collective-bargaining agreement is in effect.[31] And the Employer was not prevented from organizing its operations, in contrast to the company in *Pacific Telephone*, since employees gave assurances that they would return the following day.

Furthermore, the significant hiatus between most of the strikes undermines any argument that they were designed to harass the Employer into a state of confusion. These breaks between strikes, typically two to three months, gave the Employer ample time to put together a plan of action to minimize service disruptions during the strikes, such as by obtaining annual security badges for on-call personnel or implementing a system for calling in unscheduled workers. Indeed, the Navy Exchange has demanded such a plan with the apparent expectation that one is feasible. The fact that the Employer has failed to develop an effective staffing plan in the face of recurring strikes reflects a lack of planning on its part rather than a scheme on the part of employees to harass it into a state of confusion. In short, this is not a situation where the union left the employer in disarray by striking multiple times in a very short amount of time.[32]

Moreover, the strikes were not intended to, nor did they have the effect of, shutting down the Employer's entire operation. Only a small portion of the Employer's ten concession outlets closed during the strikes—roughly proportionate to the percentage of the workforce on strike—and there is no evidence that the strikers' absences were designed to, or did, prevent other employees from performing their jobs. Thus, while outlets closed and the Employer apparently lost some revenue as a result of the strikes, this alone is insufficient to render the strikes unprotected.[33] Unlike in *Pacific Telephone*, employees were not represented by a union that could coordinate a high-impact strike utilizing only a small number of key employees, thereby shielding most employees from the risks associated with assuming the status

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[31] *See Bethany Medical Center*, 328 NLRB 1094, 1094 (1999).

[32] *Compare, e.g.*, *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965) (in finding three walkouts over three-week period to be intermittent strikes, court emphasized the "repetitiousness of the intermittent walkouts within a short span of time" combined with the union's "threat to continue the activity in the future"), *reversing* 144 NLRB 561 (1963); *Honolulu Rapid Transit Co.*, 110 NLRB at 1808 ("bus service became seriously disorganized" because of strikes over four consecutive weekends); *Pacific Telephone*, 107 NLRB at 1548-50 (waves of strikes at different locations over nine days).

[33] *See Allied Mechanical Services, Inc.*, 341 NLRB at 1102; *Swope Ridge Geriatric Center*, 350 NLRB at 67.

of strikers.[34] Additionally, the fact that the employees are not unionized, and thus have no exclusive representative to speak on their behalf or any negotiated mechanisms for resolving their grievances, increases the importance of finding these activities in support of improved working conditions protected.[35]

The strikes are protected because employees assumed the status of strikers and did not dictate their own terms and conditions of employment

The rationale for finding strikes unprotected where employees reaped the benefits of a continuous strike action without the attendant economics risks (i.e. loss of wages and possible replacement) is inapplicable where employees completely withhold their labor for a full day or longer.[36] In such circumstances, employees necessarily lose pay, and the employer has the legal option of hiring permanent replacements. Thus here, employees did not remain on the job collecting pay while simultaneously denying the Employer the opportunity to replace them. Although the Employer's ability to hire replacements once a strike was called was constrained due to the short nature of the strike, combined with the Pentagon's security protocols, the economic risk to employees remained. Most significantly, they did lose their wages when then went on strike. Further, the risk that they would be replaced was not eliminated entirely.[37] The Employer could have arranged for new hires or employees at other facilities to be badged and on-call in case of a strike. Thus, this rationale cannot serve as the basis for denying protection to employees who engaged in a complete work stoppage for a full work day.

In addition, there can be no claim here that the strikers effectively set their own terms and conditions of employment. In *Honolulu Rapid Transit*, the Board found unprotected a union's campaign of weekend strikes that effectively truncated the

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[34] *See Pacific Telephone*, 107 NLRB at 1548, n.3 (union published article indicating that "hit and run" strikes "will beat the telephone industry" because when only a small group of employees strike, the employer "can't function efficiently in its nation-wide operations if any part of its circulation is cut off").

[35] *See Washington Aluminum*, 370 U.S. at 14-15; *Advance Industries Division*, 220 NLRB at 432.

[36] *See supra* note 16.

[37] *See Swope Ridge Geriatric Center*, 350 NLRB at 67 (although finding 24-hour weekend strikes unprotected under *Honolulu Rapid Transit*, the judge rejected the argument that the employer had been deprived of the right to permanently replace employees where it was difficult to find weekend replacements because there was "no legal impediment" to permanent replacement).

work week from seven days to five and seriously disrupted bus service.[38] In so doing, the Board found that the employees imposed their own chosen conditions of work and arrogated the "right to determine their schedules and hours of work."[39] In this regard, the Board considered a "regular weekend strike" to be indistinguishable from a "regular daily strike of 1-hour duration," which the Board had already deemed unprotected.[40]

Here, employees struck eight times over the course of almost two years, and the strikes followed no particular pattern in terms of timing. Thus, the strikes did not occur so frequently or regularly that employees were effectively setting their own work schedules, as in *Honolulu Rapid Transit*.[41] Nor did employees dictate their terms and conditions of work in any other respect. When employees reported to work, they performed all of their work duties without exception. Accordingly, these strikes did not implicate the concern that employees not be entitled to dictate their own working conditions.

The strikes are protected since employees were motivated in part by distinct grievances during the last four strikes

The argument for protecting this series of strikes is further bolstered by the fact that the latter four strikes were motivated, in part, by distinct unfair labor practices committed by the Employer. The Board has cautioned against applying the intermittent strike doctrine to cabin employees' right to engage in protected concerted activities by limiting their ability to protest different working conditions during an indefinite period.[42] Thus, in *Robertson Industries*, the Board found two strikes about three months apart protected where the grievances motivating the

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[38] 110 NLRB at 1807-09.

[39] *Id.* at 1809-10 & n.3.

[40] *Id.* at 1811. *See also Swope Ridge Geriatric Center*, 350 NLRB at 68 (applying *Honolulu Rapid Transit* in finding 24-hour weekend strikes unprotected).

[41] *See also Embossing Printers*, 268 NLRB at 723 (noting that employees "did not have a right under the Act to come and go as they pleased" in finding three walkouts over seven days to attend union meetings during working hours unprotected).

[42] *See Robertson Industries*, 216 NLRB at 362 ("To hold . . . that the two occasions establish a pattern of recurrent and intermittent work stoppages would, in our view, disallow employees to engage in more than one instance of concerted protected activity during an indefinite period of time regardless of the variety and number of conditions or occurrences protested and the identity of the individuals involved.").

actions were different, albeit overlapping.[43] During the first strike, employees protested their heavy workload, and during the second strike, employees were motivated by that and "other issues."[44] Likewise, in *Westpac Electric*, the Board upheld a finding that three strikes over a two-week period were protected where "each strike had its distinct origins and motivating antecedent features."[45] While the employees were motivated by economic reasons in striking the first time, the employer's unlawful discrimination against participants in the first strike was an "important factor" in the second strike, and its subsequent discrimination against employees involved in the second strike was an "important cause" of the third strike.[46]

Here also, the fact that employees' motivations for engaging in the strikes changed over time supports the argument that the strikes should be protected. Although the first four strikes were motivated purely by dissatisfaction over wages, the strike notices for the subsequent strikes, which were signed by employees, cited distinct unfair labor practices as the motivating reason.[47] As in *Robertson Industries*, the fact that employees had other reasons for striking, in addition to wages, during the fifth through eighth strikes weighs in favor of protection, so as not to chill employees from repeatedly engaging in protected, concerted activities for different reasons over an indefinite period. Consequently, the Employer's retaliatory acts against strikers, which were concentrated during this later period, unlawfully coerced employees in the exercise of their Section 7 rights.[48]

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[43] *Id.* at 361-62.

[44] *Id.*

[45] 321 NLRB at 1360.

[46] *Id.*

[47] Although the strike notice itself, which employees presumably read before signing, is sufficient evidence that strikers were motivated, in part, by these distinct unfair labor practices, we recommend that the Region bolster the evidence of striker motivation through employee testimony at trial.

[48] Although we conclude that all eight strikes are protected, the Region should additionally argue that the discipline of an employee for attending the second strike is unlawful because there was no evidence of an employee scheme or pattern of intermittent strikes over wages at that time. At most, only two employees actually struck during the first strike, and the second strike occurred more than six months after the first.

The strikes are protected notwithstanding that employees attended political rallies while on strike

The fact that employees attended political rallies in support of an executive order on federal contractor wages while on strike does not detract from the protected nature of the strikes. Although economic pressure in support of a political dispute may not be protected when it is exerted on an employer with no control over the subject matter of the dispute,[49] here the employees were striking over an issue—wages—that was clearly within the employer's control, and formed a central basis of the labor dispute. In each strike notice, employees raised their dissatisfaction with "poverty-level wages." And the political rallies they attended were aimed at addressing that same grievance, by pushing for a higher minimum wage for federal contractors. Since this is not a case of misdirected economic coercion, employees' strike efforts should retain their protection as concerted action for "mutual aid or protection."[50]

Moreover, we have found strikes protected where employees concertedly withheld their labor in order to seek to remedy a work-related complaint or grievance, regardless of strikers' participation in activities unrelated to the strike while they were absent from work.[51] Since the express purpose of the work stoppages, as explained in the strike notices, was to protest low wages as well as

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[49] *See* Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Memorandum GC 08-10, dated July 22, 2008, at 10 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 n.18 (1978)).

[50] Moreover, even if it were determined that the strike was a misdirected economic weapon because the Employer had no control over the issuance of an executive order, as opposed to the subject of wages, this would not mean that the Employer was free to retaliate against employees who attended the rallies. Rather, the Employer would merely be entitled to impose lawful, neutrally-applied work rules, such as an absenteeism policy, against the strikers for missing work. *See* Memorandum GC 08-10, at 13. Here, the vast majority of the Employer's allegedly unlawful retaliatory acts were not taken pursuant to such facially lawful rules.

[51] (b) (7)(A) [redacted] (b) (7)(A) [redacted] *See also Wal-Mart Stores, Inc.*, Cases 16-CA-096240 et al., JD–03–16, Jan. 21, 2016, slip op. at 65-66 (concluding that strikers who attended community rallies, among other activities, were bona fide strikers and that employees need not join a picket line for their strike activity to be protected).

unfair labor practices, employees' activities were protected notwithstanding that many strikers attended Good Jobs Nation rallies during the strikes.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by retaliating against strikers, including by discharging, disciplining, interrogating, and threatening employees, and by reducing their hours of work.

/s/
B.J.K.

ADV.05-CA-159426.Response.SevenHills.IntermittentStrikes (b) (6), (b) (7)